

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

RICHARD A. LANIGAN

Respondent.

HUDALJ 91-1715-DB
Decided: February 10, 1992

Michael F. Fetsch, Esq.
For the Respondent

Emmett N. Roden, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. Sec. 24.100 *et seq.* as a result of action taken by the Assistant Secretary for Housing and Urban Development ("the Department" or "HUD" or "the Government") on June 26, 1991, in a letter suspending and proposing to debar Respondent from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of two years beginning June 26, 1991. The action was based on Respondent's conviction in the United States District Court for the District of Minnesota of violating Title 18, Section

1012, United States Code. Respondent has appealed the June 26, 1991, action and requested a hearing. Because this case is based solely on a conviction, the evidence is limited to documents submitted into the record by the parties. (24 C.F.R. Sec. 24.313(b)(2)(ii))

Findings of Fact

1. Pursuant to a plea agreement with a United States Attorney, on August 28, 1990, Respondent pleaded guilty in the U.S. District Court for the District of Minnesota to a one-count Information charging Respondent with willfully and knowingly submitting Settlement Statements and Certificates of Commitment to HUD in connection with the purchase of residential property that falsely stated that the buyers, including Respondent, had made earnest money deposits, when in fact, they had not. (GX. 1,2; RX 1)¹ The plea agreement required Respondent to cooperate with the government in the prosecution of other individuals allegedly involved in a conspiracy to make similar false statements to HUD. (RX.1)

2. On October 25, 1990, Respondent received a sentence which placed him on probation for three years, required him to perform 150 hours of community service and ordered him to pay a fine and special assessment totalling \$50,025. (GX.1)

3. On November 13, 1990, Respondent's alleged co-conspirators were acquitted by a different Court on charges similar to those to which Respondent had pleaded guilty in August. That Court found that the government had not introduced evidence sufficient to prove the existence of a conspiracy, the falsity of the statements at issue, and knowledge on the part of the defendants that the statements were false. (RX.4)

4. On February 26, 1991, without explanation, the Court that had sentenced Respondent, in response to a motion from Respondent citing the acquittal of his alleged co-conspirators, vacated the \$50,000 fine from his sentence but left the remainder of the sentence intact. (RX.2)

Subsidiary Findings and Discussion

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. 24 C.F.R. Sec. 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. Sec. 24.115.

¹The following reference abbreviations are used in this decision: "GX." for "Government's Exhibit"; and "RX." for "Respondent's Exhibit."

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. See 24 C.F.R. Sec. 24.305. See also *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts, including a previous conviction that occurred several years before the assessment. See *Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

Cause Exists to Debar Respondent

Respondent is subject to the Department's debarment regulations codified at 24 C.F.R. Part 24 because as a borrower of funds insured by HUD-FHA, he participated in "covered" transactions. See 24 C.F.R. Secs. 24.110(a), 24.105(m), and 24.105(p). Under 24 C.F.R. Sec. 24.305, the Department may debar a participant or principal based on, *inter alia*:

(a) Conviction or civil judgment for:

* * *

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

Section 24.313(b)(3) of 24 C.F.R. provides that cause for debarment must be established by a preponderance of the evidence, a standard deemed met by evidence of a conviction. Since the record shows Respondent was convicted of making false statements to HUD, the Government has satisfied its burden to prove cause for debarment. (GX.2)

Respondent's conviction rests on a guilty plea, and the basis of his guilty plea was fully explored in the District Court.

MR. ANDERSON: Well, all right. In any event, in connection with your purchase, you did represent to FHA, on papers you signed, that there was a down payment by you, and money put into this purchase by you?

DEFENDANT LANIGAN: That is correct.

MR. ANDERSON: And in fact, in reality, there was no such money, because any money that you actually paid had been paid back to you, one way or another, by the developers of this Cinnamon Ridge development. Is that correct?

DEFENDANT LANIGAN: That is correct.

MR. ANDERSON: So as a matter of fact, you purchased this property for investment purposes, which is why you said you were going to purchase it, with no equity of your own in it, and it was completely leveraged, and you had completely borrowed the money?

DEFENDANT LANIGAN: That is correct.

MR. ANDERSON: When in fact, the paperwork that you submitted to HUD indicated that there was a, I believe it was a 15 percent equity by you?

DEFENDANT LANIGAN: I think that's correct, yes.

MR. ANDERSON: Okay. The net effect to HUD would be that they would be insuring a parcel of real estate in which the buyer had no equity?

DEFENDANT LANIGAN: That is correct.

MR. ANDERSON: And you realized, when you signed these documents to HUD, the papers that you knew were going to be sent on to HUD, that that was a false statement and, in fact, you did not have any equity in the property?

DEFENDANT LANIGAN: Yes, that's correct. [RX. 6, pp.19-20]

Respondent cannot now be heard to deny what he previously has admitted by pleading guilty. As stated in the Information, he "did willfully and knowingly make false statements to HUD"... "for the purpose of obtaining a loan with the intent that the loan be offered to and accepted by [HUD] for insurance and for the purpose of influencing the actions of HUD...." In this particular case, HUD apparently did not rely upon Respondent's statements as the basis for insuring Respondent's mortgage. But that does not alter the fact that Respondent knowingly made false statements intending that HUD would rely on them. That HUD, as it turned out, did not rely on the statements made Respondent's crime less serious and saved him from a more severe sentence; but the statements remain false and dishonest.

To protect the public fisc, HUD must trust and depend on the honesty and integrity of the people with whom it conducts business. Dishonesty breaches that trust and endangers the public fisc. Even if, as Respondent claims, he did not make the false statements intending to deprive anyone of their property, nevertheless, knowingly

making false statements is serious misconduct that warrants debarment in the public interest.

Someone who has knowingly made false statements to the Government is not "presently responsible." However, a debarment cannot stand simply and solely on evidence sufficient to establish cause for debarment. Because debarment is discretionary, it is necessary to consider any evidence in mitigation, as well as the seriousness of Respondent's misconduct. See 24 C.F.R. Sec. 24.115.

The record shows Respondent cooperated with the Government during the investigation of his case and testified against his alleged co-conspirators. Citing that cooperation, the Government requests that Respondent's debarment be reduced to two years from the more common three years contemplated by the regulations. See 24 C.F.R. Sec. 24.320.(a)(1). However, the Government's request fails to take into account the fact that the HUD did not rely upon Respondent's false statements when it insured his mortgage and the fact that the Government has suffered no pecuniary loss as a result of Respondent's false statements. These facts reduce the seriousness of the cause for debarment and require a further reduction in the length of the debarment period. Respondent will be debarred for 18 months beginning June 26, 1991, the date he was suspended. In the language of the regulations, this period of debarment is "commensurate with the seriousness of the cause(s)." (24 C.F.R. 24.320(a))

Respondent has moved for dismissal of this proceeding alleging that the Government failed to file its Brief in Support of Debarment when due. The Government's Brief was ordered to be filed on or before September 9, 1991. Section 26.14(a) of 24 C.F.R. provides:

A document is considered timely filed if postmarked on or before the date due or delivered to the appropriate person by close of business on the date due.

A copy of the Brief was received in this office on September 9, 1991, by FAX between 4:35 p.m. and 4:41 p.m., before the close of business. The original of the Brief was received via inter-office mail in this office on September 10, 1991. The record also contains a certificate of service and a certified mail receipt showing that the Government mailed a copy of the Brief to counsel for Respondent on September 9, 1991. I therefore conclude that the Government's Brief in Support of Debarment was timely filed by delivery to this office on September 9, 1991, and that Respondent was timely served with the Brief on the same day via the U.S. Mail.

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent Richard A.

Lanigan from participating in covered transactions as either a participant or a principal at HUD

and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of 18 months beginning June 26, 1991.

Respondent's Motion to Dismiss is hereby **ORDERED** denied.

THOMAS C. HEINZ
Administrative Law Judge

Dated: February 10, 1992

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by THOMAS C. HEINZ, Administrative Law Judge, HUDALJ 91-1715-DB, were sent to the following parties on this 10th day of February, 1992, in the manner indicated:

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